

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF ALABAMA**

In re

Case No. 02-33450-WRS
Chapter 7

MICHAEL BRASWELL,

Debtor

MICHELLE ARLENE BRASWELL,

Plaintiff

Adv. Pro. No. 03-3004-WRS

v.

MICHAEL BRASWELL,

Defendant

MEMORANDUM DECISION

This Adversary Proceeding was tried to the Court on June 19, 2003. Plaintiff Michelle Brawell was represented by counsel Paul R. Cooper and Defendant Michael Braswell was represented by counsel Debora Palmer. The Court, having taken the matter under submission now makes its findings of fact and conclusions of law. Judgment will be entered by a separate document.

I. FINDINGS OF FACT

The parties were formerly married, having been divorced pursuant to a decree of the Montgomery County Circuit Court dated August 15, 2002, under Case No. DR-2002-85. Plaintiff Michelle Braswell brings this Adversary Proceeding seeking a determination that some

of the indebtedness imposed upon Defendant Michael Braswell are excepted from the Defendant's discharge either pursuant to 11 U.S.C. Section 523(a)(5) or (a)(15).

The parties filed a joint petition in bankruptcy, pursuant to Chapter 13 of the Bankruptcy Code on August 18, 2000, thereby commencing Case No. 00-4414. After the divorce became final Michael Braswell moved to sever his case from his former wife's and convert his case to one under Chapter 7. (Docs. 48, 49, Case No. 00-4414). The Court granted Michael Braswell's motion over Michelle's objections. (Doc. 50, 59). Michael Braswell proceeded under his Chapter 7 case under Case No. 02-33450. The precise question presented here is whether Michael may discharge his indebtedness to Michelle in his Chapter 7 case.

The Divorce Decree contains several provisions which are relevant here. Exhibit 10. First, Michelle was awarded the home and Michael was ordered to pay the mortgage arrearage. Id. at par. 9. Second, Michael was ordered to pay one-half of the Chapter 13 payments in Case No. 00-4414. Id. at para. 11. Third, Michael was ordered to pay child support in the amount of \$847.00. Id. at para. 12. Fourth, Michael was ordered to pay Wife's attorney's fees, to the extent of \$1,500. Id. at para. 18. Fifth, the Circuit Court reserved ruling on the question of whether periodic alimony should be awarded. Id. at para. 16. The question here becomes whether Michael's obligations to pay the mortgage arrearage, one-half of the Chapter 13 payment, and \$1,500 of Michelle's attorney's fees are excepted from discharge in this Chapter 7 case.

In making the determination here, the Court may look to a number of considerations. First, the Court will look at the amount of each party's income. Michelle's income is

approximately \$20,000 per year. Plaintiff's Exhibits 7-9. Michael's income in 2001, was over \$60,000. More recently, his monthly income is \$2,967.47, as of May 28, 2003. Plaintiff's Exhibit 6. There was testimony at the trial to the effect that Michael's child support obligation was reduced as a result of reduced income. See also, Exhibit 16. Having considered the income, expenses and financial condition of both the parties, the Court finds that discharging these debts would not result in a benefit to Michael which would outweigh the detrimental consequences to Michelle.¹

The Court must next consider, as a factual matter, whether Michael has the ability to pay any of the liabilities imposed on him as a result of the divorce decree. Having considered the totality of his circumstances and having considered the fact that Michael will discharge the remainder of his liabilities, the Court finds that Michael has the ability to pay (1) an amount equal to the mortgage arrearage as of the date of the divorce decree, in the amount of \$2,700², and (2) Michelle's attorney's fees, to the extent of \$1,500. The Court finds that no other amounts are to be excepted from discharge.

¹ The Court finds, as a factual matter, that Michael has failed to satisfy the provisions of 11 U.S.C. Section 523(a)(15)(B). The Court will discuss the legal effect of this in greater detail in Part II(X) below.

² The mortgage arrearage was reported to be between \$2,500 and \$2,900, in the Schedules in Case No. 00-4414. As the evidence did not provide any amount more specific, the Court will use the midpoint of those two figures.

II. CONCLUSIONS OF LAW

This is an adversary proceeding to determine whether certain liabilities are excepted from the Debtor's discharge. This Court has jurisdiction to hear this case pursuant to 28 U.S.C. Section 1334. This is a core proceeding pursuant to 28 U.S.C. Section 157(b)(2)(I).

The Court must first determine whether the subject liabilities are excepted from discharge pursuant to 11 U.S.C. Section 523(a)(5). This provision excepts from discharge a debt for alimony. Examining the Divorce Decree as a whole, the Court determines that none of the liabilities are alimony. First, paragraph 16 of the decree expressly provides that "the Court hereby reserves periodic alimony and the right to either party to receive the same." Therefore, it was the express intention of the Circuit Court not to award alimony at that time, reserving the right to do so at a later time. Second, reading the divorce decree as a whole, it appears that the obligations are in the nature of a property division, except for those which are expressly denominated for child support. None of the liabilities in question are excepted from discharge pursuant to 11 U.S.C. Section 523(a)(5).

Next the Court must consider whether the liabilities in question are excepted from discharge pursuant to 11 U.S.C. Section 523(a)(15), which provides, in part, as follows:

A discharge under section 727 . . . does not discharge an individual debtor from any debt—

* * *

(15) not of the kind described in paragraph (5) that is incurred by the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree or other order of a

court of record, a determination made in accordance with State or territorial law by a governmental unit unless—

(A) the debtor does not have the ability to pay such debt from the income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor. . . or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.

Examining this provision, it becomes apparent that the determination of whether an indebtedness is excepted from discharge is a two-step process. First, it must be determined whether or not the debt in question is one of the kind described in paragraph (5), which is the exception for alimony. If so, the debt is excepted under that provision and it is not necessary to consider paragraph (15). To put the matter differently, the two provisions are mutually exclusive. As this Court has determined that the debts are not of the kind in paragraph (5), the first prong of the test is met.

Next, the Debtor can avoid the exception if he can prove that he fits within either of the provisions of subparagraphs (A) or (B). The Court will consider these two provisions in reverse order. Subparagraph (B) is sometimes called the balancing the harm provision, whether the benefit to the Debtor discharging the debt outweighs the harm to the former spouse. As Michelle is supporting two children on an income of \$20,000 per year, plus child support, discharging any amount owed to her will have devastating consequences to her. On the other hand, Michael has

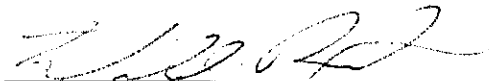
had annual income as high as \$60,000 in recent years. As of the date of the hearing, Michael's income was approximately \$40,000, which is considerably less than he had been earning, but still double his former spouse's income. For this reason, the Court found as a factual matter in Part I above, that the benefit to Michael would not outweigh the detrimental consequences to Michelle. Thus, subparagraph (B) provides Michael no relief.

The Court will next consider subparagraph (A). The burden is on the Debtor to prove that he cannot pay the debts from income or property not needed for support of the Debtor or his dependents. As of May 28, 2003, Michael's monthly gross income was \$2,967.47 per month, or \$35,610 per year. Exhibit 6. Determination of Michael's expenses is more difficult. He did not file Schedules I and J in his bankruptcy case. A Monthly Expense Statement showing that his expenses exceeded his income was offered into evidence. Exhibit 15. On cross examination, Michael was evasive and argumentative, making it difficult to make this determination with any degree of precision. Having considered the evidence and having observed the demeanor of the witnesses, the Court concludes that Michael has failed to carry his burden to show that he cannot pay the mortgage arrearage, in the amount of \$2,700 and his former spouses's attorney's fees, in the amount of \$1,500.

Michelle has also requested that the Court determine that Michael's obligation to pay one-half of her Chapter 13 payment be determined to be excepted from discharge. The Court finds that this is problematic in several respects. First, as he is already liable to pay the mortgage arrearage, there is an element of double counting. Second, Chapter 13 payments are subject to

periodic change. They are by nature prospective and do not lend themselves to proceedings such as this. Third, counsel has not cited any precedent for the proposition that a debt such as this may be subject to a Section 523 exception to discharge and this Court is aware of none. Based upon this, the Court is unwilling to make a determination of nondischargeability of a debt such as this. The Court will enter judgment by way of a separate document.

Done this 11 day of August, 2003.



William R. Sawyer
United States Bankruptcy Judge

c: Paul R. Cooper, Attorney for Plaintiff
Deborah Palmer, Attorney for Defendant